CONTEMPORARY OPINION OF THE VIRGINIA AND KENTUCKY RESOLUTIONS

I.

THE right to complete freedom in the utterance of political opinions has been so long a fundamental principle in the United States that probably few Americans will recall the fact that exactly a hundred years ago the controversy which eventuated in the complete triumph of that principle raged all over the Union. The Virginia and Kentucky Resolutions of 1798, whatever their whole purpose, were designed primarily as a protest against the infringement of this principle by the recently enacted Alien and Sedition Laws. Incidentally they gave expression to a theory concerning the nature of the federal union which was of equal or perhaps greater significance than their protest against all interference with freedom of speech. It is singular that a controversy which involved an expression of opinion by the whole American people upon two questions of so much importance should have been treated by historians as this one has been. Enough and more than enough has been written about the authorship of the resolutions and their ultimate object; but little if any serious effort has been made to ascertain what the people of the United States thought about them. When Jonathan Elliot compiled his now celebrated *Debates* he was content as regards the Resolutions of 1798 and 1799 merely to reprint a pamphlet published in 1800 by direction of the Virginia legislature, adding the Kentucky Resolutions for both years. From this material one can learn next to nothing of the public sentiment in the two states which induced the passage of the resolutions and but little of the temper in which these resolutions were received in other states. None of the memorials addressed by the county courts to the two legislatures appear in the pages of Elliot; and of sentiment outside of Virginia and Kentucky one can judge only by the answers of the seven states[1] whose legislatures sent to the Virginia legislature replies disapproving of its resolutions. Believing that these seven replies are not sufficient to represent adequately the public opinion of the entire country, I have attempted to extract from con-

[1] Delaware, New York, Connecticut, Rhode Island, Massachusetts, New Hampshire and Vermont.

temporary pamphlets and newspapers some account of such reported actions and expressions as will reveal the state of public opinion relative to the resolutions.

Prior to the meeting of the legislatures of Virginia and Kentucky, in 1798, a number of large public meetings, in both states, had denounced the recent measures of the federal government, and particularly the Alien and Sedition Laws. Most of these meetings drew up memorials on the subject and addressed them to the legislature of the state. A comparison of these memorials with the resolutions makes it plain that the passages in the resolutions which arraign the policy of the federal government merely epitomize the memorials on that point. But in respect to the remedy, some of the memorials use only vague and general expressions; others call upon the legislature to formulate the appropriate remedy and pledge the memorialists to accept it.[1] We are warranted, therefore, in concluding that the idea of the remedy which the resolutions put forward originated with their authors, and in brief with Jefferson.

Satisfied that the resolutions of 1798 represent the voice of Virginia and Kentucky in their protest, and the ideas of Thomas Jefferson in the remedy hinted at, let us see how they were regarded in the other states. Maryland, from its proximity, had the first opportunity to express an opinion upon the resolutions. The opportunity was not neglected; before the resolutions of Virginia were received and even before the probable action of that state could have been known at Annapolis, a committee of the House of Delegates was appointed to consider the resolutions of Kentucky. Four days after Virginia had passed her resolutions the report of this committee was agreed to by the House of Delegates by a vote of 58 to 14. This report is very brief and its dissent is expressed in vague and general terms: the resolutions of Kentucky are "highly *improper*, and ought not to be acceded to," for they "*contain sentiments and opinions unwarranted by the Constitution of the United States*, and the several acts of Congress to which they refer."[2]

[1] The Virginia memorials were from the following counties: Caroline (*The Genius of Liberty*, Morristown, N. J., January 10, 1799); Essex (*The Aurora*, December 7, 1798); Dinwiddie (Greenleaf's *New Daily Advertiser*, N. Y., December 8, 1798); Goochland (*The Observatory*, Richmond, August 27, 1798); Spottsylvania (*The Aurora*, November 20, 1798); Albemarle (*The Observatory*, Richmond, October 1, 1798); Orange (*The Aurora*, December 1, 1798). All these papers are in the library of Harvard University.

The Kentucky memorials were from county meetings in Woodford, Franklin, Bourbon, and Clarke counties, and town meetings at Lexington and Mount Sterling. All are in the *Palladium* (Wisc. Hist. Soc.) for August 9 to September 4, 1798, except that of Clarke county (*Kentucky Gazette*, August 1, 1798, H. U.).

[2] This report will appear in the next number of the REVIEW.

Soon after the Kentucky Resolutions had been thus disposed of the resolutions from Virginia were received and referred to a committee; the report of this committee is longer, more precise, and the proceedings upon it may be known in part.[1] The committee report that after most serious consideration and mature deliberation it is decidedly of the opinion that "a recommendation to repeal the Alien and Sedition Laws would be unwise and impolitic." An equally pointed negative is given to the remedy suggested by Virginia: "No State government by a Legislative act is competent to declare an act of the Federal Government unconstitutional and void, it being an improper interference with that jurisdiction which is exclusively vested in the Courts of the United States." The result of this reasoning is a resolution which differs from the report in only one particular, but that an important one; the resolution omits the declaration contained in the report that the power to pronounce an act of federal legislation unconstitutional and void belongs exclusively to the federal courts. It is therefore only a rejection of the Virginia remedy, not an assertion of a more appropriate one. Unfortunately the debates upon this report and resolution have not been preserved, but the proceedings so far as recorded are worthy of consideration. Prior to the final vote upon the report and resolution five votes were taken upon questions involving some portions of the whole; two of these presented only the question of the expediency of the Alien and Sedition Laws; the other three dealt with the remedy suggested by Virginia. The final vote was forty-two to twenty-four; this would seem to indicate that the endorsement of the Alien and Sedition Laws was made more prominent than the condemnation of the Virginia remedy.[2]

In the Senate the Kentucky Resolutions were presented but no action was taken upon them; in reply to Virginia the resolutions of the House of Delegates were adopted.[3] The action of the state was not officially transmitted to either Virginia or Kentucky.[4]

In Maryland, discussion of the Virginia and Kentucky Resolutions seems to have been confined almost entirely to the legislature; in Pennsylvania the debate over them was more widely extended. Philadelphia, as was natural from its commercial, social,

[1] *Ibid.*

[2] For the proceedings of the House of Delegates on the reply to Virginia see the *Albany Centinel*, February 1, 1799. H. U.

[3] *Index to the Journals of the Senate and House of Delegates*, (Annapolis, 1857), II. 60, 66, 280.

[4] All the replies officially transmitted to Virginia were included in the pamphlet, *Proceedings of the Virginia Assembly on the Answers of Sundry States to their Resolutions*, 1800. H. U. The reply of the Maryland House of Delegates to Kentucky was merely a committee report.

and intellectual prominence, enjoyed the best newspapers published in the United States. These papers, taking notice at an early date of the agitation in Virginia and Kentucky, reported its progress with considerable promptitude and fullness. Unlike most of the papers elsewhere, the Philadelphia press was not content to merely print a portion of the news; resolutions like those of Virginia and Kentucky called for comment, and the kind of comment made is significant. Fenno in the *Gazette of the United States* presented to his Federalist readers the resolutions of both states together with portions of the speech of Governor Gerrard to the legislature of Kentucky, under the title: "Fruits of French Diplomatic Skill." [1] Dismissing the resolutions without discussion, he attacked the speech. One portion of it he pronounced "a most atrocious train of misrepresentation and falsehood;" another he characterized as "too weak and contemptible to merit much attention;" the whole is an "abominable speech, distinguished no less by the depravity of its sentiments, than the most desperate folly." It was the spirit rather than the matter of the speech that alarmed Fenno; little attention was paid to the remedy which Gerrard had suggested and no attempt was made to show that it might not rightfully be employed. It was the possibility of resistance to federal government rather than the cause of that opposition or the proposed method of resistance that seemed to Fenno the important side of the affair. The resolutions seem to have had upon him an effect similar to that produced upon other Federalist editors, strengthening his already implicit belief in the rapid approach of disaster. On March 4,[2] he pointed out to his readers four "indications of approaching convulsion"; number one is "the imbecility of our frame of government," and allusions make it plain that the imbecility referred to was that which made possible such opposition to the federal government as that of the Virginia and Kentucky Resolutions. The present system he characterized as "a mere experiment," "a jangling and chaotic confusion of federal and state governments, which I can compare to nothing more nearly than a farrow of pigs, who have so strengthened and increased on the nourishment she has afforded them, as to be able to insult her authority and resist her controul."

As might have been expected, the bitterest invective came from Cobbett, who in this connection wrote some of his most characteristic paragraphs. At one moment the reader is surprised by a touch showing remarkable insight into some problem then facing the

[1] Article reprinted in the *Albany Centinel*, December 18, 1798. H. U.
[2] Article reprinted in the *Salem Gazette*, March 4, 1799. H. U.

American people; the next moment his admiration is excited by a prophecy since actually realized, or falsified only by circumstances which no man could then have anticipated; meanwhile he is constantly amused by bits of sophistical reasoning, by Cobbett's ignorance of American history or his failure to appreciate some of the most obvious traits of American character. Desiring to properly label Gerrard's speech and the Kentucky Resolutions Cobbett introduced them to his readers with the remark that he had always apprehended that the chief danger from French influence lay in the possibility that France might acquire Louisiana and aid the Kentuckians in a revolt from which they "were far from being disinclined." That the action of Kentucky is a revolt due to French influence is tacitly but none the less effectively assumed in the observation, "This most impudent speech, from the governor of that country, will enable the reader to judge how far my apprehensions are well founded."[1] To Cobbett, as to Fenno, the mere fact of opposition rather than the manner or the ground of the opposition demanded attention.

When the news of Virginia's action reached Cobbett, his anger burst forth in a long hysterical article, characterized by abusive epithets and the absence of any real argument; the Virginians are taunted with the holding of slaves and advised to study the Constitution which they profess to hold in such veneration, especially that portion of it which declares that all men are born free and equal! The address of the legislature to the people of Virginia is pronounced "little short of high treason," "the most seditious that ever daring demagogue drew up, or that ever a factious assembly had the impudence and folly to sanction."[2] Neither the protest against the Alien and Sedition Laws nor the right of a state to render them void is discussed. In his wrath against the Republicans Cobbett quite forgot to disprove their propositions. A little later he expressed a more deliberate opinion upon the result to which the Virginia and Kentucky opposition would lead. "Virginia will have either a majority in congress or a separation of the states! And, one or the other, I am afraid she will have, ere two years are at an end." But the danger of separation, he thinks, does not come from Virginia alone. "It is very certain, too, that the New Englanders want to get rid of the Southern States. Their interests are as opposite as are the manners of their inhabitants."[3] This idea that New England will resist the impending triumph of Virginian ideas Cob-

[1] *The Country Procupine*, December 12, 1798. H. U.
[2] *Ibid.*, February 6, 1799. H. U.
[3] *Ibid.*, April 3, 1799. H. U.

bett elaborates in reply to "Plain Truth," a Virginia correspondent. "In point of fact," argues Plain Truth, "no state can be permitted to withdraw itself from the union. In point of policy, no state ought to be permitted to do so." "I highly applaud," says Cobbett, "the motives of Plain Truth, and most sincerely hope, that his eloquence may produce a good effect among the Virginians. But I must confess, I do not think his reasoning is forcible. . . . . Does he imagine, that the industrious and orderly people of New England will ever suffer themselves to be governed by an impious philosopher or a gambling profligate, imposed upon them by Virginian influence? If he does, he knows little of New England. The New Englanders know well, that they are the rock of the Union. They know their own value; they feel their strength, and they will have their full share of influence in the federal government, or they will not be governed by it. It is clear, that their influence must decrease; because every man has a vote, and the middle and southern states are increasing in inhabitants, five times as fast as New England is. If Pennsylvania joins her influence to that of New England, the balance will be kept up; but, the moment she decidedly throws it into the scale of Virginia, the balance is gone, New England loses her influence in the national government, and she establishes a government of her own."[1]

Looking into the columns of the *Aurora* for expressions that will indicate the opinions of Pennsylvania Republicans upon the resolutions of their Virginia and Kentucky brethren, a peculiar attitude is discovered. Comment is almost entirely lacking, but the resolutions are published with great gusto along with other protests against the Alien and Sedition Laws. This seems to show that the resolutions were regarded as in the main a protest against obnoxious laws, though the impolicy of insisting too much upon what was likely to prove unpopular in Pennsylvania may have had a share in producing silence as regards the proposed remedy. Yet in August the *Observatory*, of Richmond, Virginia, copied from a Philadelphia paper a short item which seems to show that some Pennsylvania Republicans did approve of the tenets of their Virginia and Kentucky brethren. "Is not every officer of a state government sworn to support the constitution of the U. States? If the federal government passes laws contravening the constitution, is it not a breach of oath in a state officer to carry such laws into effect? Are not the states as well as the federal government to judge of the Constitution? Is not the Constitution a contract between the different states? Are not they to judge whether this contract be broken or

[1] *The Country Porcupine*, April 1, 1799. H. U.

violated? If congress can annul a contract with a foreign nation because of its violation, will not the same justice operate to modifying or annulling a contract between States, which is no longer regarded?"[1]

Legislative action upon the resolutions was not so prompt in Pennsylvania as in Maryland, but when taken was not less decisive. On January 25 the governor transmitted to the legislature the resolutions of Kentucky. In the Senate a motion was at once made to lay them upon the table, apparently for the purpose of securing some discussion of the resolutions. But even this scant courtesy was refused and the motion was defeated by a vote of fourteen to eight.[2] In the House of Representatives no action was taken until February 1, when a course different in sort but similar in purpose was pursued. Six counter-resolutions were adopted "by a considerable majority." These counter-resolutions are devoted almost exclusively to Kentucky's protest and remedy for the Alien and Sedition Laws. These laws are "just rules of civil conduct, and component parts of a system against the aggressions of a nation, aiming at the dominion of the world"; the favorite Federalist argument, that no well-behaved citizen need fear the operation of the Alien and Sedition Laws, is repeated at length. Disapproval of the Kentucky remedy is even more strongly expressed: a declaration by a state legislature that an act of the federal government is void and of no effect is a "revolutionary measure" as dangerous as unwarranted. The House does not stop, however, with denying the Kentucky doctrine but proceeds to enunciate its own counter-doctrine. "Resolved, That in the opinion of this House, the people of the United States have vested in their President and Congress, the right and the power of determining on the intent and construction of the Constitution, as on the ordinary subjects of legislation, and the defence of the Union; and have committed to the Supreme Judiciary of the nation the high authority, of ultimately and exclusively deciding on the constitutionality of all legislative acts."[3]

When the Virginia Resolutions were received, on March 9, the Senate repeated its former action; "voted them under the table" is the description of the Federalist press. The House, as before, dismissed them by resolution, but this time no argument was indulged in.[4] The principles of Virginia "are calculated to excite unwarrantable discontents, and to destroy the very existence of

[1] *The Observatory*, August 9, 1799. H. U.

[2] *The Philadelphia Gazette*, January 26, 1799. H. U.

[3] These resolutions will appear in the next number of the REVIEW.

[4] *Ibid.*

government. They ought to be and are hereby rejected." This resolution was passed by a vote of forty-three to twenty-five, seemingly a party division and indicating that the constitutional doctrines of Virginia were not so heretical in the eyes of Pennsylvania Republicans as to preclude the partial endorsement of them which a vote against the resolution implied.

Delaware took prompt action upon each set of resolutions; on January 21, both houses of the General Assembly united in the opinion that the resolutions of Kentucky were "a very unjustifiable interference with the general government, and the constituted authorities of the United States, and of dangerous tendency, and therefore not a fit subject for further consideration of the General Assembly."[1] Eleven days later exactly the same words were again employed to dismiss the Virginia Resolutions.[2]

The New Jersey legislature did not meet until January 16, 1799, but its action was foreshadowed two days before in the *Federalist, or New Jersey Gazette*.[3] The Virginia and Kentucky Resolutions will be dismissed "with contempt," for sedition forms no item of natural rights in New Jersey. Its second argument sounds like an echo of 1787 and shows that the *Gazette* understood the art of befogging the real issue by an appeal to ancient prejudices. Virginia, in reality, cares little or nothing for the Alien and Sedition Laws; it is the Constitution she aims at destroying, and that because the small states have an equality with herself in the Senate.

Four days after the appearance of this article the legislature disposed of both sets of resolutions in the manner predicted. But this action was not taken before a lively debate in the House had shown exactly the attitude of both the Federalist and the Republican members of the legislature towards the resolutions.[4] Additional interest is given to this debate by the fact that it is one of the two debates in the state legislatures over replies to the Virginia and Kentucky Resolutions which have been preserved for us. Messrs. Campbell and Van Cleve, speaking for the Federalists, urged immediate dismissal by a unanimous vote. About the subject-matter of the resolutions "no honest American could entertain a doubt"; "all seemed to express, both publicly and privately, the most decided disapprobation of them." The consideration of a suitable

[1] *Philadelphia Magazine and Review*, February, 1799. H. U.

[2] Elliot's *Debates*, IV. 558.

[3] *The Federalist, or New Jersey Gazette*, January 14, 1799. Am. Antiq. Soc.

[4] The account of the debate here given is extracted from a detailed report which appeared in several New Jersey papers. See the *Federalist*, January 21, 1799 (A. A. S.); the *Guardian, or New-Brunswick Advertiser*, January 29, 1799 (A. A. S.); the *State Gazette*, January 29, 1799 (A. A. S.).

reply would involve a waste of time and the public money; an appearance of respect for a sister state is not demanded towards one which has shown so little respect for the general government and in its resolutions offered the greatest possible insult to this state; a reply must be expressed in terms of the highest disapprobation and probably would be more irritating than the action proposed.

For the Republicans the motions to dismiss the resolutions were opposed by Messrs. Pennington, Southard, Stillwell and Morgan. All four expressed their own disapproval of the resolutions,[1] two of them asserting, without contradiction, that the resolution had no friends in the House.[2] Thus seeming to agree with the Federalists as to the merits of the resolutions they advanced a variety of arguments for a different disposal of them, advocating a reply which should state the reasons of the legislature for rejection. The subject-matter of the resolutions involves questions of the highest importance to the welfare and happiness of the states, but upon which there is much difference of opinion and agitation in the public mind. A sister state, especially one of the importance of Virginia should be treated with respect; if the resolutions are indecent, "let us not retort upon them indecency." It is certainly the duty of New Jersey to endeavor to appease, not to irritate, and a well-reasoned reply will be the most likely means of preserving harmony between the states and may tend to work conviction. Many members of the House cannot be persuaded to vote for instant dismissal, and to force a vote upon that issue would create an appearance of division of opinion in regard to the merits of the resolutions. But these arguments were of no avail, for the vote upon the motions to dismiss appears to have been a strict party division, twenty to fifteen. In the Senate no action appears to have been taken, that of the House being regarded as sufficient.

From the debate in the House one might conclude that New Jersey Republicans were not opposed to the Alien and Sedition Laws and differed from the Federalists over the Virginia and Kentucky Resolutions only in desiring a respectful reply to them instead of a summary dismissal. But an inspection of the columns of the Republican newspapers of New Jersey shows beyond all doubt that

[1] Pennington: "could not approve of the resolutions," "I disapprove of the resolutions as much as any man." Southard: "He should be sorry to be understood as approving of the resolutions," "he was of opinion that they had gone much too far." Stillwell: "He much disapproved of the resolutions." Morgan: "voted for retaining the Virginia resolutions, not that he approved of them."

[2] Pennington: "I am persuaded that not a man on this floor, will vote for them." Morgan: "I cannot think that any gentleman on this floor, would wish to countenance those resolutions."

New Jersey Republicans disapproved of the Alien and Sedition Laws,[1] being on that point in exact accord with their brethren of Virginia and Kentucky. The *Centinel of Freedom*, the leading Republican paper of the state, published by a kinsman of Pennington, the Republican legislative leader, in commenting on the action of the House in dismissing the resolutions, asks: "What else could compel the exclusive Federalists to such a precipitant measure, but the fear, that upon a fair and candid investigation of the Constitutionality of the Alien and Sedition Acts, they would have been declared unwarrantable by the Legislature?"[2] Even in respect to the remedy it appears that the Republicans in the legislature were not in complete agreement with the Federalists, and that outside the legislature there were various degrees of difference among Republicans, some going, apparently, to the point of accepting the Virginia and Kentucky Resolutions entire.

The attitude of the Republican members of the legislature is shown in a set of resolutions offered by Pennington at the next meeting of the House, on January 21.[3] A long preamble sets forth that from the nature of the federal and state governments, each having powers in some cases exclusive and in others concurrent, and being "without a common judge to fix the precise boundary," it was expected that differences would arise. The amendment clause was provided to secure the adjustment of these differences; therefore, the resolutions call upon Congress to assemble a convention "to amend the Constitution of the United States in such sort, as accurately to define the powers given to the said government of the United States, and precisely to mark out the boundaries of power between the state and general governments, in such a way, if possible, as to leave nothing to construction, and particularly to ascertain, and specially define the powers of the general government relative to crimes." These resolutions show conclusively that the Republican members of the New Jersey legislature did not accept the Federalist doctrine that the Supreme Court of the United States is the final arbiter of differences between the federal government and the states; they further indicate an inclination, to put it no stronger, to accept all the constitutional reasoning of the Virginia and Kentucky Resolutions except the final conclusion, that each state may judge for itself. The resolutions were, of course, rejected by the Federalist majority,

[1] For evidence of the Republican opposition to the Alien and Sedition Laws see the *New Jersey Journal*, October 2, 1798; the *Newark Gazette*, January 22, 1799; the *Centinel of Freedom*, January 22, 1799. All H. U.

[2] January 22, 1799.

[3] These resolutions are printed in full in the *Federalist or New Jersey Gazette*, February 15, 1799. A. A. S.

being dismissed on their first reading and not suffered to appear in the minutes of the House.

Some New Jersey Republicans were ready to go further; in fact, to accept the resolutions entire. One of these wrote a long article upon the subject for the *Genius of Liberty*, signing himself "Observor."[1] He was surprised and disappointed that the merits of the Virginia and Kentucky Resolutions were not touched upon in the recent discussion in the House; two points ought to have received attention, (1) whether the Alien and Sedition Laws were constitutional or not; (2) and if they were not, "whether they should adopt the same mode of resolution."

"But perhaps some passive, quiescent member of the house will say, the Legislature of a state have no right to give an opinion, whether a law of Congress is constitutional or not—let Congress, or the federal supreme court, decide such question (and it is no matter which, if either is to decide), but the objection must fall to the ground on a moment's reflection. The constitution is a solemn compact, made between the individual states, as sovereignties, and the U. States collectively; who, as such, possess inherently no such powers, and Congress have no right whatever to exercise any power not expressly delegated in that compact; and all other power, not so delegated, remains entire, and belongs to the individual states; and as much so as though no such compact had been made, and as much so as the sovereignty of any state or power in Europe. Now let me ask, when a treaty or compact is made between two sovereign powers, and infracted by one of the parties, shall that party, or its court, decide whether it has itself broken the compact or not? When Congress, in a late act, declared France had broken the treaty with us, and that all obligation, on our part, ceased in consequence thereof, was this the case then? Did we wait, or submit it to them to decide, whether they had infracted the compact or not? Surely not, nor can it be right, in the present case, nor in any case whatever, without totally destroying the idea of sovereignty. If the doctrine of the objector is valid, and the states, individually, have no right to judge when the constitution is violated by Congress, there is an end to all state sovereignty, and state legislation, and we are at once consolidated; and it will be futile to elect and pay a state legislature: besides, in the case of the alien law, and many other cases, the supreme court can have no jurisdiction, the suspicion of the President is all-sufficient to inflict the penalty; how then is the supreme court to judge of the constitutionality of a law which it is not to execute?"

The Federalist newspapers of New York state were, for the most part, content to copy the comments of the Philadelphia representatives of their faith upon the Virginia and Kentucky Resolutions, their own additions being few and short. Of real argument there was less in these additional remarks than in the comments of the Philadelphia papers, but the tone was even firmer. The *New York Gazette* concluded its account of Gerrard's speech thus: "But, thanks to the wisdom of Congress, WE HAVE A SEDITION LAW:

[1] *The Genius of Liberty*. Morristown, March 7, 1799. H. U.

and though a Governor may say much with impunity, the wretched understrappers of the party are doomed to swallow in part the bile with which they would otherwise bespatter the BEST PATRIOTS of America."[1] Another New York city paper pronounced the resolutions an attempt to separate the northern and southern states, adding: "We sincerely wish these efforts to bring the question to a crisis will succeed; and the sooner the better. We are not in the least apprehensive about the issue. There is a spirit of union and firmness in the northern states, ... which, if called to act in the adjustment of *civil* disputes about alien and sedition laws, will speedily put an end to all town meeting controversies on that subject." This threat it made advisedly, warning sedition-mongers to weigh well the consequences before proceeding further.[2]

Governor Jay communicated the resolutions of Virginia and Kentucky to the legislature promptly, but that body was slow to take action, nothing being done until the Federalists discovered that inaction was being construed as implying disapproval of the federal administration and its alien and sedition policy.[3] On February 15 and 16 the resolutions were discussed in the lower house and disposed of; as the resolution adopted contained no provision for its transmission to Virginia and Kentucky it has hitherto been overlooked, the reply of the Senate being taken for that of the state.[4] No reports of what was said in this debate have been preserved for us, and our sources of information even as regards the procedure are provokingly meagre. The entire matter was disposed of in committee of the whole; four or five attempts were made by the Republicans to amend the resolution offered by the Federalists. One of these was to incorporate a declaration that the Alien and Sedition Laws were unconstitutional and that Congress ought to repeal them; another proposed to expunge from the Federalist resolution the declaration that the right to decide upon the constitutionality of the Alien and Sedition Laws belonged to the judiciary. These, like all the other attempts at amendment, failed; but they are interesting as showing that the Republicans in the New York House of Representatives, like those of New Jersey, endorsed the Virginia and Kentucky protest against the Alien and Sedition Laws and shared to some extent their constitutional doctrines, though they were unwilling to declare that a state may judge for itself in cases of difference with the federal government.

[1] *Albany Centinel*, January 29, 1799. H. U.

[2] *Ibid.*

[3] *Ibid.*, February 19, 1799.

[4] These resolutions will appear in the next number of the REVIEW.

When the final vote came the division was strictly upon party lines, fifty to forty-three. The preamble and resolution adopted are short and directly to the point. The right to decide upon the constitutionality of laws passed by Congress belongs to the judiciary, the assumption of that power by a state legislature is unwarrantable and dangerous; this house, accordingly, disclaims for itself such a power as that assumed by the legislatures of Virginia and Kentucky, to pass upon either the expediency or the constitutionality of the Alien and Sedition Laws, and the committee is discharged from further consideration of the matter.

In the Senate, as in the House, consideration of the resolutions was chiefly in committee of the whole; but of the proceedings there nothing has been learned. When the committee rose, on March 5, Mr. Van Vechten, a Federalist leader, reported the preamble and resolution which constitute the New York reply as given in Elliot's *Debates*. Spencer, the Republican leader, offered a substitute which declared that the senators think "themselves, individually, and in a legislative capacity, invested with the right of expressing their opinions upon the acts and proceedings of Congress; and that in cases of dangerous encroachments and innovations on the rights and sovereignty of the State Legislatures, it would become their bounden duty to mark and proclaim such innovations; yet this committee, most solemnly impressed with the importance and necessity of preserving harmony between the national and state governments at the present eventful period, do not judge it expedient or proper to adopt the resolutions of the States of Virginia and Kentucky." Another Republican member offered a resolution consisting of a brief statement, that it would be improper to adopt the resolutions of Virginia and Kentucky. Debate upon these substitutes was shut off by the previous question, carried by party votes. An amendment offered by Spencer for the purpose of making it appear that the reply of the Senate was chiefly directed against those portions of the Virginia and Kentucky Resolutions which assert for the states a power to render acts of Congress void, was defeated though several Federalists joined with the Republicans on that issue. Then the final vote came and the division was strictly according to party lines, 31 to 7.[1] The questions passed upon in the Senate did not involve the attitude of its members towards the protesting and the remedial features of the Virginia and Kentucky Resolutions so exactly as did those raised in the House, but taking them together they show, beyond much doubt, that the attitude of the Republicans in both houses was the same, endorsement of the

[1] *Albany Centinel*, March 8, 1799. H. U.

protest and partial acceptance of the reasoning upon which the remedy was grounded.[1]

When the Kentucky Resolutions were laid before the General Court of Massachusetts the Federalist leaders in that body seem to have determined that the disapprobation of Massachusetts should be expressed with no uncertain sound. Accordingly, a joint committee of both houses was appointed for their consideration; this committee, consisting of three from the Senate and four from the House, was composed entirely of Federalists and had for its most distinguished members John Lowell and Nathan Dane.[2] The Virginia Resolutions, arriving after the appointment of the committee, were also referred to it.[3]

Both sets of resolutions were in the hands of the committee by January 18, but the report upon them was not presented to the Senate until Saturday, February 2. On the Monday following, as the result of a considerable debate upon the proper form of proceeding, the report was referred back to the committee to be changed from resolutions into a declaration. The next day the report came up for discussion on its merits. What was said by the Federalists cannot be ascertained, as the Senate met in secret session and none of the Federalists published their speeches. There was but one Republican in the Senate, John Bacon of Berkshire, but he made a determined protest against the report of the joint committee and afterwards published his speech in the *Chronicle*.[4]

Remarking that the committee had chosen to direct their arguments chiefly at establishing the constitutionality of the Alien and Sedition Laws, Bacon announced that his attention would be confined to that question, even to the exclusion of another of at least equal importance, "the question respecting the right finally to judge and determine as to the constitutionality of the acts of the General Government." The remainder of the speech, which occupied four columns in the *Chronicle*, is a well-considered presentation of the familiar Republican arguments against the constitutionality of the

[1] The attitude of the Republicans in the legislature appears to have been that of the party generally; see an article from the *Albany Register*, reprinted by the *Chronicle* (Boston), February 25, 1799.

"It is impossible to conceive a doctrine more opposed to the constitution of our choice, than that a decision as to the constitutionality of all legislative acts rests solely with the Judiciary Department; it is removing the corner stone on which our federal compact rests; it is taking from the people the ultimate sovereignty, and conferring it on agents appointed for specified purposes; it is giving an administration the power of passing what laws they please, and of course a power to set at defiance the constitution whenever it may run counter to their projects of tyranny and ambition."

[2] The names will be found in the *Columbian Centinel*, January 23, 1799.

[3] *Massachusetts Mercury*, January 22, 1799.

[4] February 14, 1799.

Alien and Sedition Laws; its tone is remarkably moderate throughout. Of course Bacon's reasoning did not convince any of his Federalist colleagues, but it cannot be said to have been without effect, for the President of the Senate moved that the report be referred back to the committee "for the purpose of strengthening it by new and more cogent reasons."[1]

Three days later the committee presented its report again, containing "additional reasons in support of the alien and sedition laws." As now amended the report was passed by a vote of thirty-one to two, one Federalist voting against it because of a passage declaring that in all cases involving the Constitution and laws of the United States the decision belongs to the judiciary. On the day following the matter was reconsidered and the passage altered to read "cases in law and equity," whereupon the objecting Federalist changed sides, leaving the final vote all but unanimous.[2]

In the House of Representatives consideration of the report was confined to a single day, February 12. This debate was open to the public and from the reports of the *Mercury* and the *Chronicle* a good idea of the debate may be obtained.[3]

For the Federalists, Mr. Pickman of Salem opened in what the *Mercury* called "a very able, eloquent and classical speech." He pronounced the Alien and Sedition Laws both constitutional and expedient, denying that aliens had any rights under the Constitution. The greater part of his speech was a defence of what he denominated the chief feature of the report, its constitutional doctrines. It is evident that Pickman dwelt more particularly upon the disastrous consequences which would certainly follow interference by the states than upon the question of their right to interfere, using that *ex necessitate* method of constitutional argumentation so much employed by the Federalists—a given course of action would result badly, therefore it must be inhibited by the Constitution.

Colonel Barnes of Marlborough denied the right of the state governments to interfere in any manner in federal questions, and from this principle disapproved of giving any opinion upon the subject. This scruple, which was shared by other Federalists, was overcome by the next Federalist speaker, John Lowell, who explained that the report should be considered as only an expression of the individual opinions of the members, not as a legislative declaration. Some such expression of their individual opinions was

[1] *Columbian Centinel*, February 9, 1799.

[2] *Philadelphia Magazine*, March, 1799, pp. 114–115. H. U.

[3] In the account which follows I have used the report of the *Mercury* unless the *Chronicle* is indicated. See the *Mercury*, February 19, 1799, and the *Chronicle*, February 14, 1799.

absolutely imperative under the circumstances, for silence would be construed as assent to the doctrines of Virginia and Kentucky.

Lowell, as the Federalist leader in the House and as a member of the joint committee, made the most elaborate argument in behalf of the report. Three distinct propositions are involved in the report. 1. "The first, and the most important," said Lowell, is "that the State Legislatures have no constitutional right to judge of the acts and measures of the Federal Government." 2. The Alien and Sedition Laws are constitutional. 3. They are also "expedient and necessary." In support of the second and third propositions, Lowell argued that the Alien Law was forced upon the United States by the machinations of France; that the Sedition Law was equally well grounded and, if possible, yet more expedient. For the constitutionality of the Sedition Law Lowell offered no argument, while upon that phase of the Alien Law his only argument was to declare, in reply to a challenge to point out the clause of the Constitution which warranted it, "the very object and scope of the Federal Compact was to invest in one *general* head the whole National Concerns."

Taking the Federalist speeches in the aggregate there appears to have been considerable warrant for the *Chronicle's* complaint that the question was superficially argued by the advocates of the report. Doubtless the certainty of a large majority in its favor will account for this and for their maintaining, as the *Chronicle* charged, an intolerant and contemptuous attitude towards their opponents "more conspicuous than ever disgraced these walls."

On the Republican side five or six short speeches were made by different members, but little can be learned about the ground which they took for opposing the report. The *Mercury*, the only paper which notices these speeches, states that all of these speakers "professed a strong disapprobation of the Resolutions of Virginia, but could not agree to the proposition adopted by the Senate in reply to them." The only elaborate speech on the Republican side was one read from manuscript by Dr. Aaron Hill of Cambridge in concluding the debate. This, like the speech of Bacon in the Senate, was afterwards published in the *Chronicle*.[1] The most important feature of it is the portion devoted to a consideration of the declaration contained in the report, that the right to pass upon the constitutionality of federal laws belongs to the federal government. Denying the correctness of this doctrine, Hill set forth what he conceived to be the true nature of the federal union and the rights of the states in cases of encroachment upon their reserved powers.

[1] *Chronicle*, February 25, 1799.

"The Federal Government is, as the term imports, a confederation of States, and the People of each State have transferred to the United States, such a portion of their power as is, in the Constitution specified, to be exercised by Congress, and have reserved the Remainder to the States, to be exercised by their respective Legislatures . . . From the distribution of power in the Federal and State Constitutions, it appears that Congress are the proper guardians of the one, and the State Legislatures of the others, and while the individual States retain any portion of their sovereignty, they must have the right to judge of any infringement made on their Constitutions, for if the right is transferred exclusively to Congress, or to any department of the General Government, no vestige of sovereignty can remain to the individual States, but they become a consolidated instead of a Federal Government, and the oath and declaration required by our Constitution, will remain a lasting monument of the inconsistency of a People who require of their Agents an oath to defend, without a right to judge whether it is attacked."

This, certainly, is not much short of the remedial doctrines of the Virginia and Kentucky Resolutions. At the conclusion of this speech the vote was taken and the report was accepted.

The action of the General Court was, of course, quite differently received by the Federalist and Republican papers of Boston. Before the report had been considered in either house the *Centinel* had confidently announced that what such a committee should report "must be correct."[1] When both houses had stamped the report with the seal of their approval the elation of the *Centinel* knew no bounds; the document will be "an everlasting record of the Wisdom, Patriotism and enlightened Policy of the present times. . . . Indeed, he who now doubts the rectitude of such principles must be worse than an infidel."[2]

When political fanaticism reaches the pitch of arrogance displayed by this remark of the *Centinel* and by that of the Federalist member of the House, who stigmatized his Republican opponents as a "contemptible minority," one need not be surprised to find Republican dissent, however modest its expression, treated in a summary fashion. The tone of the *Chronicle*, tested by the standard set in the *Centinel* and other Federalist papers, was a model for fairness and courtesy towards its opponents; measured even by the standards of today, there was little in its tone to which exception might fairly be taken. But this moderation did not secure its publishers from persecution for persistently adhering to their political convictions. Within a week after the passage of the Massachusetts reply to Virginia and Kentucky, provocation for an attack upon the *Chronicle* was found in two articles that appeared on February 18. In one of these a correspondent observed that in May 1798 Massachusetts was a "free, sovereign and independent state" except in

[1] January 23, 1799. [2] February 16, 1799.

matters specially committed to the federal government. As proof of this assertion he appealed to the evidence furnished by about two hundred respectable witnesses, who, in order to secure seats in the legislature of the Commonwealth, had taken oath to that fact and to their opinion that it ought to be so. But recently, when the state of Virginia propounded the question whether the sovereignty of the individual states was not invaded by certain acts of Congress, a majority of these same witnesses disclaimed for the legislature of Massachusetts and all the states "any right to decide upon the constitutionality of any act of Congress." This action by the majority of the witnesses led the correspondent to make the following request:

"As it is so difficult for common capacities to conceive of a *sovereignty* so situated, that the *Sovereign shall have no right to decide on any invasion of his constitutional powers;* it is hoped for the convenience of those tender consciences who may hereafter be called upon to swear allegiance to the State, that some gentleman skilled in federal logic will show how the oath of allegiance is to be understood, that every man may be so guarded and informed, as not to call upon the Deity to witness a falsehood."

The other article consisted of a few remarks upon Bacon's speech in the Senate. It contained this sentence: "The name of the American Bacon will be handed down to the latest generations of freemen, with high respect and gratitude, while the names of such as have aimed a death wound to the constitution of the United States will rot above ground and be unsavory to the nostrils of every lover of republican freedom."

The next day after the appearance of these articles in the *Chronicle* the Supreme Judicial Court of the Commonwealth opened its term in Boston. Chief-Justice Dana in his charge to the grand jury called its attention to the articles, remarking that he obtained a copy of the paper by accident, for if he were a subscriber "his conscience would charge him with assisting a traitorous enmity to the Government of his country."[1]

The result of Chief-Justice Dana's harangue to the grand jury was the return of an indictment against Thomas Adams, editor and publisher of the *Chronicle*, and Abijah Adams, a younger brother, employed in the office of the paper.[2] They were charged with an offense against the peace and dignity of the Commonwealth in "contriving falsely and maliciously to bring the Government into disrespect, hatred and contempt among the good and liege citizens of the commonwealth," and with encouraging sedition, disobedience and opposition to the laws, by the articles already quoted.

[1] *Massachusetts Mercury*, February 22, 1799.

[2] The indictment and other papers connected with the case are in the manuscript records of the Massachusetts Supreme Judicial Court, Vol. 1799, folio 183, No. 8191.

On February 22 Chief-Justice Dana issued a writ commanding the sheriff to arrest the culprits. Under this writ Abijah Adams was taken into custody, but was released pending his trial upon furnishing bail in the sum of one thousand dollars. Thomas Adams was not arrested. At the time he was suffering from what proved to be a fatal illness, and the sheriff returned a certificate signed by two physicians affirming that he could not be taken before the court without serious danger to his life.

The arrest of the younger Adams took place on the twenty-seventh of February and on the following day the *Chronicle* for the first time took notice of the attack upon itself. Less than ten lines sufficed for the simple announcement that the younger Adams had been arrested and that his trial would begin the next day. Ultimately the indictment and every transaction connected with the affair, the *Chronicle* promised, would be minutely handled for the public instruction, but prior to the decision, "We scorn to attempt to bias our numerous readers on this subject." This promise was kept and not a single line further appeared in the *Chronicle* until after the entire affair was over; then the whole case of the defense was published in four installments, aggregating twenty-five columns.[1] From this elaborate argument, brief notices of the trial in the *Mercury* and *Centinel*, and the manuscript records of the Supreme Judicial Court a quite complete account of the entire trial can be extracted.

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(*To be continued.*)

[1] *Chronicle*, April 11 to May 2, 1799.